No. 80-1229

Office-Supreme Court, U.S.
FILED
JAN 19 1981
ALEXA...

In The

Supreme Court of the United States

October Term, 1980

DANIEL EHRMAN,

Petitioner,

vs.

CITY OF PHILADELPHIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTION PRESENTED FOR REVIEW

Can a federal employee, working upon an exclusive jurisdiction federal enclave, who commutes daily to such employment without ever entering the state surrounding the enclave, be subjected to state taxation upon his federal earnings?

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No.

In The

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October Term, 1980

DANIEL EHRMAN,

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vs.

CITY OF PHILADELPHIA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

OPINIONS BELOW

The Supreme Court of New Jersey did not file an opinion with its order denying the petition for certification. The order is attached hereto as Appendix A. The opinion of the New Jersey Superior Court, Appellate Division, is unreported and is attached hereto as Appendix B. The opinion of the Gloucester County District Court was delivered from the bench and has not been reported. A copy of this opinion is attached as Appendix C.

JURISDICTION

The Supreme Court of New Jersey denied a petition for certification on October 21, 1980 (Appendix, 1a). The jurisdiction of this Court is invoked under Title 28, U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns the application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution which states as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petitioner in this case is an employee of the federal government working on an exclusive jurisdiction federal enclave commonly known as the Philadelphia Naval Base. During all times relevant to this petition, Mr. Ehrman was a resident of the State of New Jersey who commuted to his job by taking a privately operated ferry from National Park, New Jersey, across the Delaware River directly to a point within the boundaries of the federal enclave — never entering the City of Philadelphia. The Commonwealth of Pennsylvania ceded all jurisdiction over

this property to the United States government in 1868, retaining only the right to serve civil and criminal process. The City of Philadelphia does not provide municipal services to the Naval Base, which has its own fire department and police.

The City of Philadelphia instituted a civil action in the Pennsylvania court in an effort to collect its municipal wage tax, basing jurisdiction solely on Mr. Ehrman's employment, and obtained a default judgment. It is this judgment which the City of Philadelphia is seeking to enforce in the New Jersey courts.

The Gloucester County District Court granted summary judgment (Appendix C, 7a) and was affirmed by the New Jersey Superior Court, Appellate Division (Appendix B, 4a). A petition for certification was denied by the New Jersey Supreme Court (Appendix A, 1a).

At each stage, the defense raised the issue of whether there were sufficient minimum contacts to satisfy the Due Process Clause of the Fourteenth Amendment to the United States Constitution as required by *International Shoe Company v. Washington*, 326 U.S. 310 (1945). The Gloucester County District Court found sufficient contacts (6a) but the matter was not addressed in the opinion of the Appellate Division.

REASON FOR GRANTING THE WRIT

Employment upon an exclusive jurisdiction federal enclave is insufficient minimum contact with the State of Pennsylvania to establish "presence" in Pennsylvania and to thereby satisfy the requirements of due process of law.

The Pennsylvania judgment which respondent seeks to enforce was rendered against a defendant who had no contacts with the State of Pennsylvania since all activities upon which the Pennsylvania court based its assertion of jurisdiction occurred

within an exclusive jurisdiction federal enclave. Plainly put, petitioner asks this Court to declare that the thirty-eight year old holding of the Pennsylvania Supreme Court in *Kiker v. City of Philadelphia,* 31 A. 2d 289 (1943), is wrong.

The question is essentially one of "presence" or what has more recently been termed the "territorial jurisdiction" of the Court. *International Shoe Company v. Washington,* 326 U.S. 310 (1945); *Shaffer v. Heitner,* 427 U.S. 565 (1977). The leading case in our law is, of course, *International Shoe Company v. Washington, supra,* which grappled with the concept of "presence" as it related to a foreign corporation's amenability to suit on the tax claims of the State of Washington. There, the Supreme Court of the United States held:

> "Appellant having rendered itself amenable to suit upon obligations arising out of activities of its salesmen in Washington, the State may maintain the present suit in personam to collect the tax laid upon the exercise of the privilege of employing appellant's salesmen within the State. For Washington has made one of those activities which taken together establish appellant's 'presence' there for purposes of suit, the taxable event by which the State brings appellant within the reach of its taxing power. The State thus has constitutional power to lay the tax and to subject appellant to suit to recover it. The activities which establish its 'presence' subject it alike to taxation by the State and to suit to recover the tax." *International Shoe Company v. Washington, supra* at 321.

Thus, "presence" within the jurisdiction of the foreign state is the necessary inquiry and in the *International Shoe Company* case, the "minimum contact test" was used to establish such

presence. But in the case at bar, the Court is faced with slightly different factual circumstances that were faced in *International Shoe Company* because there no one disputed the territorial boundaries of the State of Washington. In the present case, however, the petitioner indeed disputes that Pennsylvania has any territorial jurisdiction to lay a tax in the federal area. The rule is that an individual must have activities within the jurisdiction of a state which seeks to exercise judicial power over him but the converse is likewise true: The state which seeks to exercise judicial power over an individual must have jurisdiction over the place he carries on his activities. Surely, if Philadelphia, as a matter of law, deemed Salem County, New Jersey, to be within its territory, New Jersey courts would not be compelled to recognize judgments based upon such a fallacious foundation.

Clearly, the cession of an area to the federal government by a state without reservation renders such area immune to taxation or other state legislative activity. *Standard Oil Company v. California,* 291 U.S. 242 (1934). Thus, in the *Standard Oil Company* case, the state could not impose an excise tax on gasoline sold within a military post. This principle has been followed time and again in regard to many attempted impositions by a state such as oil and gas franchise taxes. *Humble Pipe Co. v. Waggonner,* 376 U.S. 369 (1964) and milk price control laws, *Paul v. United States,* 371 U.S. 245 (1962). The rule is clear:

> "A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States." *Standard Oil v. California, supra* at 245.

Where a state reserves unto itself some element of jurisdiction in the federal area ceded, however, it may exercise legislative power consistent therewith. *James v. Dravo*

Contracting Co., 302 U.S. 134 (1937). In *Dravo*, the State of West Virginia reserved "concurrent jurisdiction . . . for all purposes" in its cession of certain waterfront properties to the United States. Thus, it was held that Dravo Contracting Co., a foreign corporation doing business in the federal area was subject to tax by the state. The United States Supreme Court observed:

> "As the Solicitor General has pointed out, a transfer of legislative jurisdiction comes with it not only benefits, but obligations, and it may be highly desirable, in the interest both of the National Government and of the State that the latter should not be entirely ousted of its jurisdiction." *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) at 148.

The governmental obligations mentioned in *Dravo* which are imposed upon a sovereign are not abstractions particularly in the field of taxation. No sovereign may impose exactions upon tax subjects whom it has no duty to serve. The nexus between the availability of governmental protection, opportunities, and benefits and the tax is the essence of jurisdiction. The United States Supreme Court states the rule as follows:

> "Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot; however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event', 'jurisdiction to tax', 'business situs', 'extraterritoriality', are all compendious

> ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J.C. Penny,* 311 U.S. 435 (1940).

Applying these principles to the case presently before the Court, it is clear that League Island and other Philadelphia federal areas are exclusive jurisdiction federal enclaves. The cession of these areas was without reservation save "the right to serve criminal and civil process". *Kiker v. City of Philadelphia,* 31 A. 2d 289 (1943). The City of Philadelphia has no legal ability to give the non-resident federal employee protection, opportunities or benefits because that is the exclusive prerogative of the national government. In short, the state cannot give anything to non-residents for which it can ask a return. *Wisconsin v. J.C. Penny, supra.* It is averred and proof would have been presented at trial if one had taken place, no benefits are received by or available to that class of non-resident federal employees of which petitioner is a part.

Upon this foundation, this Honorable Court must decide the question considered by the Pennsylvania Supreme Court in 1943 in *Kiker v. City of Philadelphia, supra:* What was the effect of the Buck Act, 4 U.S.C. §106 upon Philadelphia's right to tax in the federal areas? The Buck Act provides:

> "No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, *having jurisdiction to levy such a tax*, by reason of his residing within a federal area or receiving income from transactions occurring or services performed in such area; and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such state to the same extent and with the same effect as though such area was not a federal area." 4 U.S.C. §106. (Emphasis added.)

The plain import of the language used by Congress in this Act was to declare that in those cases where a person was liable for any income tax levied by any state or any taxing authority therein "having jurisdiction to levy such a tax" he should not be relieved from that liability "by reason of his residing within a federal area or receiving income from the transactions occurring or services performed in such area". Philadelphia is obliged to have "possession of jurisdiction" over the taxpayer (*i.e.*, jurisdiction to levy "such a tax on this person's income") before it can say to him, "You are not relieved from our city income tax by reason of the fact that you receive your income for services performed in the Federal area". *See Kiker v. City of Philadelphia*, 31 A. 2d 289 (1943) dissent of Chief Justice Maxey at 303. The only Supreme Court case to construe the Buck Act is not inconsistent with such a view. *Howard v. Commissioner*, 344 U.S. 624 (1953).

The legislative history of the Buck Act supports this position. Prior to the United States Supreme Court's holding in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 465 (1939), federal employees were immune from taxation by any other governmental body. With the decision in *O'Keefe* federal

employees lost their absolute immunity by their state of residence. Congress then enacted the Public Salary Tax Act of 1939, 4 U.S.C. §84(a) to render all federal employees subject to taxation in the state of their residence. However, some federal employees who lived upon the federal enclave and worked within a state or who lived within a state but received wages upon a federal enclave tried to avoid the effect of the Public Salary Tax Act. As an attempt to shore-up this loophole, Congress passed the Buck Act in 1940.

The Buck Act was not blanket authority to tax the non-resident federal employee. The State of Pennsylvania has no obligation to provide governmental services to the petitioner and hence no jurisdiction to impose a tax upon his activities in the federal area. The *Kiker* holding that the Buck Act indeed conferred such power has been criticized by commentators:

> "How the majority opinion accomplishes this end is novel and rather speciously maintained. Aiding itself by a succession of presumptions, assumptions and implications the Court resolved its own uncertainties by adroitness which is nothing short of legal legerdemain." *The Philadelphia Wage Tax and Its Litigation,* 17 Temple L.Q. 272 (1943).

In *James v. Dravo Contracting Co.,* 302 U.S. 134 (1937), the obligation to provide governmental services was clear by the reservation of "concurrent jurisdiction . . . for all purposes". Thus, the power of jurisdiction to tax could be asserted. In the instant case, no legislative jurisdiction was reserved or receded and thus the Buck Act conferred (as its clear language dictates) the jurisdiction and power to levy and collect income taxes only if it was first established that Pennsylvania qualified as a state

"*having jurisdiction to levy such a tax*". In taxation jurisdiction to levy such a tax means having a rational nexus with the obligation to provide services and benefits.

Petitioner contends that the issues in this case, although never directly considered by this Court, are of great importance to thousands of persons who commute across state lines for purposes of employment.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

s/ George J. Botcheos

LASKIN & BOTCHEOS
Attorneys for Petitioner

APPENDIX A — ORDER OF THE SUPREME COURT OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
C-127 SEPTEMBER TERM 1980

Filed Oct. 21, 1980

CITY OF PHILADELPHIA,

Plaintiff-Respondent,

v.

ALWYN HARTMAN, JOSEPH DLUHOS, EDWARD RUIZ, WILLIAM HAZZARD, JOHN A. ROCCATO, DOROTHY KOSLUK, DANIEL EHRMAN, JOSEPH MIDLOVICH, RAYMOND HORNER, and RUDOLPH GIROUARD,

Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2691-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 20th day of October, 1980.

s/ Stephen W. Townsend
Clerk

Appendix A

/tsg

A TRUE COPY
s/ Stephen Townsend
Clerk

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2691-78

CITY OF PHILADELPHIA,

Plaintiff-Respondent,

v.

ALWYN HARTMAN, JOSEPH DLUHOS, EDWARD RUIZ, WILLIAM HAZZARD, JOHN A. ROCCATO, DOROTHY KOSLUK,* DANIEL EHRMAN, JOSEPH MIKLOVICH, RAYMOND HORNER and RUDOLPH GIROUARD,

Defendants-Appellants.

Argued: May 20, 1980 — Decided: May 28, 1980

Before Judges Fritz, Kole and Lane.

On appeal from Gloucester County District Court.

William S. Ruggierio argued the cause for appellants (Ruggierio & Freeman, attorneys).

---

* Although the notice of appeal includes Dorothy Kosluk, the only complaint in the record involving Kosluk is against Paul Gerard Kosluk.

Appendix B

Charles Crabbe Thomas argued the cause for respondent.

PER CURIAM

The City of Philadelphia recovered judgments against defendants in the trial court predicated on Pennsylvania court judgments which, in turn, were based on defendants' failure to pay the Philadelphia wage tax. This appeal followed.

We have concluded that there is patently no merit to any of the contentions raised on this appeal. One of these contentions is that the instant cases are legally distinguishable from *Stadler,* cited below, since defendants here (1) commute daily via ferry boat across the Delaware River from National Park, New Jersey to a point of disembarkation within the boundaries of the "exclusive jurisdiction federal area" or "federal enclave known as 'League Island' or . . . 'The Philadelphia Naval Base,'" and (2) by reason of their never setting foot in the city during their travel to or from employment at the naval base, do not use the city's services.

The present case is governed by our opinion in *City of Philadelphia v. Stadler, et al.,* ____ *N.J. Super.* ____ (App. Div. April 18, 1980), as well as the New Jersey Supreme Court's opinion in *City of Philadelphia v. Smith,* ____ *N.J.* ____ (April 2, 1980) and *Kiker v. Philadelphia,* 346 *Pa.* 624, 31 *A.* 2d 289 (S. Ct. 1943), *cert.* den. 320 *U.S.* 741, 88 *L.Ed.* 439 (1943).

Affirmed.

A TRUE COPY
s/ Elizabeth McLaughlin
Clerk

APPENDIX C — OPINION OF GLOUCESTER COUNTY DISTRICT COURT

GLOUCESTER COUNTY DISTRICT COURT

Docket No. 65,245

CITY OF PHILADELPHIA,

Plaintiff,

v.

PAUL EHRMAN, et als.,

Defendants.

Before: Judge Milton L. Silver

February 5, 1979

* * *

In all these cases the complaints by the City of Philadelphia are based upon judgments which the city secured in Pennsylvania, in the trial courts over there, and they now rely on the Full Faith and Credit Clause of the Federal Constitution. It's undisputed that all the defendants are New Jersey residents and were employed at the—by the Federal Government at the Philadelphia Naval Base or as it's called Leage Island and they were all assessed by the City for Philadelphia wage taxes. And in each case the—well, in most of the cases—I—well they did secure initial jurisdiction over each defendant. Under the Long Arm Statute and in most cases, the defendants failed to answer and default judgments were entered against them. However, in

some of the cases, the defendants did answer, appeared and still judgments were entered against them. Now in these motions the defendants all contend that these judgments are not entitled to full Faith and Credit, mostly on grounds of lack of due process. Seems to me that the fundamental issue is whether or not jurisdiction was acquired in Pennsylvania and if it was then all the other matters which defendants now raise were required to be litigated in Pennsylvania and where the defendants did appear, some of these arguments were litigated and resolved against the defendants. No question about it under the Pennsylvania Long Arm Statute, these defendants must have had the sufficient minimal contacts for the purpose of securing jurisdiction by registered mail. The Pennsylvania statute itself says that working in Philadelphia is a sufficient minimal contact because I believe the statute says that working there constitutes doing business there. And as was pointed out I believe in the Stadler case in Burlington County, they had the benefits of police protection in Philadelphia, use of the streets, etc. and it's now raised that the ones that go by ferry don't touch the streets, have no direct contact with Philadelphia. However, I'm sure the City of Philadelphia and their harbor police patrol the Delaware River, at least in some part of the area around Leage Island and would have exclusive jurisdiction of that waterway, maybe concurrent jurisdiction with the Federal Government, but there still is police protection to be secured upon the rivers. I—fail to see that it makes any difference if the defendants travel through Philadelphia, cross the river or go in by helicopter. They're still have—they still have the minimal contacts and the validity of that Pennsylvania statute which determines that working there is doing business there is to be litigated by the Pennsylvania courts and their construction of it is binding upon the courts of other states. Therefore I find that in each case, jurisdiction was secured over these defendants. And as I said that being the case,

the other arguments are not required to be answered and—however, all of these arguments have been litigated and resolved either in the Pennsylvania courts or in Federal courts in some cases and have been resolved against the defendants in this case. As to this public policy question, it's already been determined that the public policy of one state does not apply to money judgments secured in another state and these resolutions which have been passed by the New Jersey legislature merely in my opinion, express a dislike for this si--- type of tax. That is imposing a wage tax on a New Jersey resident by a foreign state or a foreign city. Accordingly, I determine in each case that there exists no—genuine issue as to any material facts and the Plaintiff is entitled to summary judgment in each case and upon submission of an order, I'll sign.

* * *